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No. 785

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

TWIN CITY POWER COMPANY AND WILLIAM P. DAUGHTY, ITS MORTGAGEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Federal rules involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	19
Appendix	20

CITATIONS

Cases:

Adamson v. *Gilliland*, 242 U. S. 350	11
Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680	11
Boston Chamber of Commerce v. *Boston*, 217 U. S. 189	16–17
Davis v. *Schwartz*, 155 U. S. 631	11
Ferroline Corp. v. *General Aniline & Film Corp.*, 207 F. 2d 912	13
Krinsley v. *United Artists Corp.*, 225 F. 2d 579	13
Mayor and City Council of Baltimore v. *United States*, 147 F. 2d 786	17
McAllister v. *United States*, 348 U. S. 19	14
Messer v. *United States*, 157 F. 2d 793	17
Morris Plan Industrial Bank v. *Henderson*, 131 F. 2d 975	14
Santa Cruz Oil Corporation v. *Allbright-Nell Co.*, 115 F. 2d 604	11
Slocum, In re, 22 F. 2d 282	11
Stephens v. *United States*, 235 F. 2d 467	11
United States v. *Bobinski*, 244 F. 2d 299	12
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	5
United States v. *Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492	12
United States v. *Cunningham*, 246 F. 2d 330	12

Cases—Continued

	Page
United States v. *1532.63 Acres of Land, etc.*, 86 F. Supp. 467	5, 6
United States v. *1,030.7 Acres of Land, more or less, situate in Dawson, Forsyth and Hall Counties, State of Georgia, and P. D. Waters, et al.*, Civil Action No. 681, N. D. Ga	18
United States v. *Petty Motor Co.*, 327 U. S. 372	17
United States v. *Twin City Power Co.*, 215 F. 2d 592, reversed, 350 U. S. 222	4, 6, 10
United States v. *Twin City Power Co. of Georgia*, 221 F. 2d 299, reversed, 350 U. S. 956	6
United States v. *3,928.09 Acres of Land*, 114 F. Supp. 719	6
United States v. *2979.72 Acres of Land, etc.*, 235 F. 2d 327	16
United States v. *Various Tracts of Land in Columbia and Lincoln Counties, Georgia, Augusta Power Company, claimant, et al.*, Civil Actions Nos. 432, 521 and 523, S. D. Ga	18
United States v. *Virginia Electric & Power Co.*, 350 U. S. 956	15, 18
United States v. *Wallace*, 201 F. 2d 65	12
United States v. *Waymire*, 202 F. 2d 550	12
United States v. *West Virginia Power Co.*, 56 F. Supp. 298	15
United States v. *Yellow Cab Co.*, 338 U. S. 338	11
Statutes and rules:	
Act of December 22, 1944, 58 Stat. 887	4
Rule 71A (h), Fed. Rules Civ. Proc	2, 5, 12
Rule 53 (e) (2), Fed Rules Civ. Proc	3, 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 15, 1957.

OPINIONS BELOW

The district court did not write an opinion. Its views are set forth in its order dated November 1, 1956 (R. 226–234).[1] The opinion of the court of appeals and its further opinion denying rehearing (Appendix, *infra*, pp. 20–33) are reported at 248 F. 2d 108.

[1] "R." references are to the Appendix for the United States filed in the court below. References to the appendix to this petition are shown as "(Appendix, *infra*, p. —)."

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, pp. 33–34) was entered on July 15, 1957. A timely petition for rehearing was denied on September 18, 1957. By order of the Chief Justice, dated December 12, 1957, the time for filing a petition for a writ of certiorari was extended to and including February 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether findings of value made by commissioners appointed under Rule 71A (h), Fed. Rules Civ. Proc., may be rejected by a district court, which did not see or hear the witnesses or receive further evidence, purely on the basis of a differing estimate of the weight to be accorded to the conflicting testimony of the witnesses.

2. Whether the court of appeals misapprehended its reviewing function when it applied the "clearly erroneous" test to the district court's valuation rather than to the commissioners' valuation.

3. Whether the United States may be required to pay agricultural or timber value for the destruction of a flowage easement.

FEDERAL RULES INVOLVED

Rule 71A (h), Fed. Rules Civ. Proc., provides as follows:

> *Trial.*—If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensa-

tion shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

Rule 53 (e) (2), Fed. Rules Civ. Proc., provides as follows:

> *In Non-Jury Actions.*—In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify

it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

STATEMENT

This is a sequel to *United States* v. *Twin City Power Co.*, No. 463, October Term 1954, in which this Court granted certiorari (348 U. S. 910) and reversed a judgment awarding just compensation for the taking of certain property (350 U. S. 222, rehearing denied, 350 U. S. 1009). The essential facts may be summarized as follows:

Pursuant to the Act of December 22, 1944, 58 Stat. 887, 894, the United States condemned certain lands owned by the Twin City Power Company, and its wholly owned subsidiary, Twin City Power Company of Georgia, for the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia.

In South Carolina, Twin City owned the fee to 1,610.80 acres and claimed flowage easements over 156.5 acres; and in Georgia, through its subsidiary, Twin City owned the fee to 2,908.35 acres and claimed flowage easements over 32 acres (R. 199). The fee-owned lands were condemned as part of the site for the Clark Hill Reservoir by three suits filed in the United States District Court for the Western District of South Carolina and by three other suits instituted in the United States District Court for the Southern District of Georgia. As to the flowage easements, Twin City asserted claims based on early deeds, the Government contending that these were insufficient to convey or prove title and that any easements

thereunder had been abandoned (R. 197–198). Declarations of taking were filed covering the fee-owned lands, and the lands are now under water.

The lands lay on either side of the Savannah River and extended 11 miles upstream from Price's Island (R. 193). They were acquired between 1901 and 1910 as a site for the reservoir of a dam which Twin City hoped to build at Price's Island. A dam was not built and, until inundated by the United States, the lands were vacant and unimproved. Twin City and owners of other lands condemned for the project filed answers claiming the lands were highly valuable as reservoir sites for dams on the Savannah River. The United States, relying on *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 75–76, moved to strike these claims on the ground that the owner of property located on a navigable stream could not claim water power or power site value when the United States, in the exercise of the commerce power, undertook to control the stream. Both district courts (sitting together) denied the motions to strike. *United States* v. *1532.63 Acres of Land, etc.*, 86 F. Supp. 467.

Thereafter, the South Carolina district court appointed commissioners, pursuant to Rule 71A (h), Fed. Rules Civ. Proc., to try the issue of compensation. The Georgia district court appointed the same commissioners to fix the value of the Georgia lands of Twin City's subsidiary.

On May 14, 1953, the commissioners filed their report (R. 190–208), in which, considering "water power value," they awarded $471,904.45 for the South Carolina lands. Pursuant to the request of counsel for

the parties (R. 204), the commissioners also found that as agricultural or wild forest lands the Twin City property in South Carolina was worth $60,293.60, or about $37 an acre (R. 207–208). On August 26, 1953, the trial court overruled objections by both parties. It declined to pass on the commissioners' agricultural or wild forest valuation of the lands. *United States* v. *3,928.09 Acres of Land,* 114 F. Supp. 719.

The United States appealed, and the court of appeals affirmed. *United States* v. *Twin City Power Co.,* 215 F. 2d 592. Upon petition by the United States, this Court granted certiorari and reversed the judgment of the court of appeals. *United States* v. *Twin City Power Co.,* 350 U. S. 222, rehearing denied, 350 U. S. 1009.[2]

On remand, Twin City first moved the district court to reopen the cases for additional testimony (R. 218), but later withdrew such motion and, without alleging errors of law, urged that the court increase substantially the awards based on agricultural or wild forest land value. The district court did so. By

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[2] Litigation involving lands on the Georgia side of the Savannah River, owned by Twin City's wholly owned subsidiary, Twin City Power Company of Georgia, followed the same course. In the three condemnation proceedings involving Georgia lands, the United States District Court for the Southern District of Georgia adopted the opinion of the United States District Court for the Western District of South Carolina, reported as *United States* v. *1532.63 Acres of Land, etc.,* 86 F. Supp. 467. The United States Court of Appeals for the Fifth Circuit affirmed (*United States* v. *Twin City Power Co. of Georgia,* 221 F. 2d 299), and its judgment was reversed by this Court. *United States* v. *Twin City Power Co. of Georgia,* 350 U. S. 956, rehearing denied 350 U. S. 1009.

order dated November 1, 1956 (R. 226–234), the court held that the commissioners' findings based on agricultural or forest land value were "clearly erroneous," expressing the opinion that the testimony of a Twin City witness, W. N. Henderson, was "entitled to more weight than that of the witnesses for the United States" (R. 233). Accordingly, it found values which increased the commissioners' awards of roughly $37 an acre for South Carolina lands to approximately $80 per acre (R. 234).[3] The United States appealed, challenging this increase in valuation.[4]

The commissioners had denied Twin City's claim to any award for the tracts over which the commission found Twin City had flowage easements, on the ground that "if water power valuation is not the true basis for determining just compensation, then these flowage acres have no value whatsoever in the hands of Twin City" (R. 206). Respondent appealed from this denial and also reiterated its claim to power value.[5]

On this second round of appeals, the Court of Appeals for the Fourth Circuit affirmed the judgments of the district court in so far as they awarded compensation for the lands as to which the fee simple was

[3] The Georgia district judge, sitting together with the South Carolina district judge, took the same action in relation to the Georgia lands owned by respondent's subsidiary.

[4] A similar appeal from the Georgia judgments was taken to the Court of Appeals for the Fifth Circuit.

[5] Respondent's subsidiary appealed to the Fifth Circuit from the comparable judgment provision entered in the companion case. The appeals to the Fifth Circuit were argued on October 23, 1957, but have not yet been decided.

taken, but reversed the judgments of the district court in so far as they denied compensation with respect to the 156.56 acres over which Twin City claimed flowage easements (Appendix, *infra*, p. 34). In a petition for rehearing, the United States urged (1) that the opinion of the court of appeals was based upon an erroneous assumption of fact, *i. e.*, that the United States had not paid for the fee title to the parcels subject to Twin City's so-called flowage easements; (2) that fairness to the Government required correction of the opinion to eliminate the unfounded charge that, in substance, the United States was seeking to get something for nothing; (3) that the opinion, in holding that the issue before the court of appeals was not whether the commissioners' findings were amply supported, but whether the district court's findings were so supported, was based upon an erroneous concept of appellate review which placed the court of appeals in direct conflict with other circuits; and (4) that the court of appeals had exceeded its jurisdiction in directing the court to enter awards it had no power to make. On September 18, 1957, the petition for rehearing was denied in a *per curiam* opinion which elaborated upon the court's reasons for reversing the disallowance of the flowage easement claim, even though recognizing that the United States had paid agricultural and timber value to the fee owners (Appendix *infra*, pp. 30–33).[6]

[6] The petition for rehearing showed the details whereby the fee owner in one instance sold his 54 acres to the United States for $1,425 and, in another case, the fee owner received, by stipulation in condemnation proceedings, $3,500 for her 184 acres, of which 102 acres were subject to the flowage easement.

REASONS FOR GRANTING THE WRIT

1. Questions of valuation do not admit of mathematically precise answers. Characteristically, expert opinions on property values cover a wide range. In these circumstances, there is particularly sound reason for insisting that deference be given to the ultimate findings reached by the trier of the facts. The "clearly erroneous" test (Rule 53 (e) (2), *supra*, pp. 3–4) requires no less.

Convincing evidence supports the awards made by the commissioners in these cases. Several Government witnesses, it is to be observed, testified to values less than those which the commissioners adopted. The opinions of the appraisers who testified for the Government were rested, *inter alia*, upon the following: (1) evidence of actual purchases and sales of similar properties in the area as testified to from personal experiences (R. 54, 85–87, 89–91, 94–95, 99, 170–171), as well as other sales of similar properties in the vicinity involved (R. 61, 114–126);[7] (2) actual cruises of the timber (R. 48–52, 63–84); and (3) close

[7] While counsel for respondent brought out that the lists of sales compiled by one of the Government witnesses, Spencer R. Cooley, contained sales at higher prices than those concerning which specific testimony had been given on direct examination, it was made clear that Mr. Cooley's list contained many sales included simply to get the trend of the market (*e. g.*, R. 105, 113, 137–138, 142–143, 153, 157), and that sales referred to by counsel for respondent were of improved properties and other properties of considerably higher tyype (*i. e.*, on paved roads, having large quantities of merchantable timber, etc.) than the Twin City lands so that they could not be considered as truly comparable in determining values (*e. g.*, R. 154–157).

familiarity with the lands involved over a period of many years (*e. g.*, R. 52–53, 84, 87, 104–105, 108–110, 161–164).[7]

Respondent was unable to point to any error of law in the commissioners' award for agricultural or forest land value.[8] Its basic position was that the commissioners should not have believed the Government's land appraisers in preference to respondent's. The district court, in substituting its own valuation figure for that adopted by the commissioners (a figure which it more than doubled), relied almost exclusively upon the testimony of one of respondent's witnesses, W. N. Henderson. It had neither seen nor heard any of the appraisers, a circumstance reflected in its comment (R. 233) that it had found Henderson competent "in other condemnation cases." This assessment of weight to be given the testimony of one witness rather than others, *i. e.*, the determination of their credibility, is a matter which this Court and the lower federal courts have consistently declared should be determined

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[7] This sound approach should be contrasted with the nebulous nature of respondent's valuations: (1) no comparable sales—not one transfer of property at the price range testified to could be named by either of the two land value witnesses for respondent (R. 24–25, 28, 42–43); (2) no actual cruises of the timber (R. 20–21, 34–35). Indeed, one of these witnesses admitted that "It would have been impossible for me to arrive at an idea as to what had been on the land * * *" (R. 43). And it should be noted that this witness acknowledged that he allowed a 20 to 25 percent increase for power site value (R. 44), a value ruled out by this Court. *United States* v. *Twin City Power Co.*, 350 U. S. 222.

[8] Respondent's objections to the agricultural and timber valuations are embodied in its objections Nos. 10, 11, 12 and 14 (R. 215–217).

by the trier of fact. The persons who saw the witnesses can better judge the worth of their testimony by observing their demeanor on the witness stand, their tone of voice, which is often revealing, their frankness or evasiveness in responding to critical questions and similar intangibles which are not reflected in the written record. See *e. g., Davis* v. *Schwartz,* 155 U. S. 631; *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, 689; *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 341–342; *In re Slocum,* 22 F. 2d 282, 285 (C. A. 2); *Santa Cruz Oil Corporation* v. *Allbright-Nell Co.,* 115 F. 2d 604, 607 (C. A. 7).

This Court has gone so far as to say that findings based on credibility of witnesses "must be treated as unassailable." *Adamson* v. *Gilliland,* 242 U. S. 350, 353. In *Stephens* v. *United States,* 235 F. 2d 467, 471 (C. A. 5), the court held that a federal condemnation commission "was not bound to accept the valuation of any particular witness." The present doubling of the commissioner's award to reflect Henderson's valuation is, in effect, a holding that here the commission was bound to accept his valuation and reject those of government witnesses. We submit that the Fifth Circuit was right when it said in the *Stephens* case that it could not "reverse merely because the commission found a valuation more closely based upon the testimony of the Government appraisers than upon that of the landowners' witnesses."

Had there been errors of law in the fact-finding process, the appropriate course would have been to recommit the matter to the commissioners with instructions (Rule 53 (e) (2), *supra,* pp. 3–4). Alternatively,

the district court itself might have taken further evidence (*ibid*). We believe that there were no such errors here, and that there was highly persuasive evidence to support the result reached by those who actually tried the valuation issue. In no event, however, is it appropriate for a district judge, in reviewing a report of commissioners, to choose among items of conflicting testimony and to pick a valuation figure solely upon the basis of his reading of a cold record and his own estimate as to the relative credibility of unseen witnesses. This misconception of his function by the district judge raises a question of substantial importance in condemnation cases, especially so since it appears that demands for jury trial in such cases are being denied with increasing frequency in favor of submission to commissioners under Rule 71A (h), (*supra*, pp. 2–3).[10] Moreover, the same principles apply in all non-jury cases in which there is a reference to a master. Rule 53 (e) (2). Finally, we point out that exactly the same issue is raised in the companion case which is *sub judice* in the Fifth Circuit (see notes 4, 5, p. 7, *supra*).

2. The district court's error was compounded by the court of appeals. In considering the Government's

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[10] See *United States* v. *Cunningham*, 246 F. 2d 330, 332–333 (C. A. 4); *United States* v. *Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492, 498 (C. A. 8); *United States* v. *Waymire*, 202 F. 2d 550, 552 (C. A. 10); *United States* v. *Wallace*, 201 F. 2d 65, 66–67 (C. A. 10). Cf. *United States* v. *Bobinski*, 244 F. 2d 299, 301 (C. A. 2). The volume of condemnation cases to be expected is indicated by the fact that there are now pending 2548 cases to condemn a total of 28,796 tracts of land for various federal purposes.

appeal, the court of appeals assumed that it should determine whether the valuation figure reached by the district court, rather than the valuation figure adopted by the commissioners, was clearly erroneous. It stated its concept of its reviewing function as follows (Appendix, *infra*, p. 26): "We review the District Judge, not the commissioners; and under Rule 52 (a) we may not set aside his findings unless they are clearly erroneous."

Whether one applies the "clearly erroneous" test to the commissioners' determination or to the district court's is a question of substance, not one of form. As previously observed, the permissible range of opinion in a valuation case may be broad. It may well be that, in the instant case, neither a finding of $37 per acre or of $80 per acre can be demonstrated to be "clearly erroneous." What the court of appeals has done, in brief, is to give to the determination of the initial reviewer—the district court—the deference which we believe is due the findings of the trier of the facts.

In doing so, the Fourth Circuit is inconsistent with other circuits. Thus, in *Krinsley* v. *United Artists Corp.*, 225 F. 2d 579, 582, and earlier in *Ferroline Corp. v. General Aniline & Film Corp.*, 207 F. 2d 912, 920, the Court of Appeals for the Seventh Circuit stated the rule as follows:

> Findings of fact by a master are binding on the trial court unless clearly erroneous. F. R. Civ. P. 53 (e) (2), 28 U. S. C. A. The threshold question here then is the *same as it was in the court below*—whether as a matter of law,

the master's findings of fact were *clearly erroneous.*

In *Morris Plan Industrial Bank* v. *Henderson,* 131 F. 2d 975, the Court of Appeals for the Second Circuit, considering the same issue, similarly stated (p. 977): "We therefore hold that the question is the same in this court as it was in the district court." Cf. *McAllister* v. *United States,* 348 U. S. 19, 20–21. This conflict of views—one which potentially affects any case in which the initial determinations of fact are made by commissioners or by a master—should be resolved by this Court.

3. This case also presents a substantial question involving the substantive law of condemnation. The court of appeals, disagreeing with both the commissioners and the district court, has decreed compensation for flowage easements on the basis of the agricultural or forestry value of the lands upon which these easements were imposed. This misconceives fundamental principles of real property and condemnation law.

These lands, at the time of taking, were farms or timber lands. The owners were entitled under the Fifth Amendment to be paid the agricultural or timber value of their lands. Recognizing these obligations, the United States paid them, either by voluntary purchase or by stipulation in condemnation proceedings.

Respondent, the commissioners found, owned flowage easements in the lands, that is, the right to use the land of the fee owners by flooding them in connection with a power project, if such were ever con-

structed. The commissioners acted initially upon the assumption that respondent could be awarded compensation for the loss of the possibility of such construction, *i. e.*, power value. On this assumption, they attributed substantial value to the "flowage easements." The commissioners concluded, however, that, if power site value was not allowable (as this Court ultimately held), the flowage easements would have to be excluded in any alternative award to respondent for the lands it owned in fee, stating (R. 206):

> Of course, in computing land valuations, no consideration whatever was given to the so-called "flowage acres." Twin City did not have fee title to these acres, designated as "flowage acres"; and, if water power valuation is not the true basis for determining just compensation, then these flowage acres, have no value whatsoever in the hands of Twin City.[11]

The "flowage acres" were likewise excluded by the district court following this Court's decision in the earlier case.

The novel doctrine that the holder of a mere flowage easement is somehow entitled to payment on the basis of values inhering in the owner of the fee was first announced by the Fourth Circuit following the vacation and remand in *United States* v. *Virginia Electric & Power Co.*, 350 U. S. 956 (a summary reversal

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[11] Compare *United States* v. *West Virginia Power Co.*, 56 F. Supp. 298 (S. D. W. Va.), in which the court, referring to another power Company's flowage rights, stated (p. 303): "The only possible value of the easements owned by it in these lands is their value for waterpower purposes."

based on the authority of this Court's *Twin City* decision). *United States* v. *2979.72 Acres of Land, etc.*, 235 F. 2d 327, 237 F. 2d 165. In the instant case, the court has adhered to this view. Yet, it would seem self-evident that a flowage easement gives no right to grow crops, raise cattle or cultivate trees, and that talk of value for "agricultural and forestry purposes" (Appendix, *infra*, pp. 21, 22, 30, 31, 32) has no pertinence for purposes of valuing such easement.

The court of appeals, to support a substantial award to respondent, has invoked the so-called "unit rule" of valuation. This is the principle that property which has been used as an entity should be so treated in determining the amount the United States must pay for it, disregarding, for that purpose, divisions of ownership such as leases, life tenancies, etc. After that total is determined, it is divided among those entitled to compensation. But an easement separates the use, not just the title. Its value has no relationship to the servient tenement. When taken, compensation for the easement is based upon depreciation that may occur to the dominant tenement, because of loss of the possible use for which it was created. For example, when a right of way is taken, loss, if any, is based upon depreciation because of loss of access, not a per square foot or other figure for the street itself. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195, so held:

> But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole

> when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained.[12]

The opinions below fly in the face of these principles.

The situation may be summarily stated as follows: Respondent's only right in the lands was to flood them for power use and it has no claim to value of the timber or the crops or the value of other uses to which the lands might be put. The fee owners had a complete right to the value of the crops, the timber, or of all other such uses. And the United States, power value being excluded, is required to pay only the value of the land for such uses. Any award to the respondent power company based on agricultural or timber value would either diminish the award to which the fee owner is entitled[13] or would require the United States to pay value for such use twice. Either alternative is unjust. The United States should be required to make substantial compensation for the "right to flood the land" (Appendix, *infra*,

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[12] Put otherwise, "there is no necessary relationship between the total reached by adding the value of an easement in land to the value of the servient tenement, on the one hand, and the value of an unencumbered fee on the other." *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C. A. 4).

[13] Of course, when the United States paid the fee owners the agreed value for other-than-power uses it stepped into their shoes, as against respondent. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 374; *Messer* v. *United States*, 157 F. 2d 793, 795, fn. 5 (C. A. 5).

p. 31) only if that right had substantial value in private hands. Here, it had not.[14]

The Government is engaged in numerous river improvement projects and there will doubtless be many more in the future. Like Twin City, numerous power companies throughout the country have acquired flowage easements near locations which are logical sites for a dam and reservoir. The question therefore is one that is bound to recur. Indeed, apart from the instant case and the *Virginia Electric & Power Co.* case, to which we adverted above, the same issue has already been raised in two cases now pending in the district courts.[15]

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[14] Absent a private right to build a power project upon the navigable stream, it is apparent that there would be no market for respondent's easements conferring the right to flood, and that their value could hardly be more than nominal. Indeed, the commissioners have already found that the flowage acres have no value whatsoever in the hands of Twin City if water power valuation is excluded (R. 206).

[15] *United States* v. *Various Tracts of Land in Columbia and Lincoln Counties, Georgia, Augusta Power Company, claimant, et al.*, Civil Actions Nos. 432, 521 and 523 (S. D. Ga.); *United States* v. *1,030.17 Acres of Land, more or less, situate in Dawson, Forsyth and Hall Counties, State of Georgia, and P. D. Waters, et al.*, Civil Action No. 681 (N. D. Ga. (Tract No. I-970-1-2-E)).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 1958.

APPENDIX

In the United States Court of Appeals for the Fourth Circuit

No. 7427

UNITED STATES OF AMERICA, APPELLANT AND CROSS-APPELLEE

v.

TWIN CITY POWER COMPANY, APPELLEE AND CROSS-APPELLANT (TRACT NO. C–215)

No. 7428

UNITED STATES OF AMERICA, APPELLANT AND CROSS-APPELLEE

v.

TWIN CITY POWER COMPANY, APPELLEE AND CROSS-APPELLANT (TRACTS NOS. F–500 AND H–700)

No. 7429

UNITED STATES OF AMERICA, APPELLANT AND CROSS-APPELLEE

v.

TWIN CITY POWER COMPANY, APPELLEE AND CROSS-APPELLANT (TRACTS NOS. F–541 (PART) AND H–732)

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT GREENWOOD

(Argued June 13, 1957. Decided July 15, 1957)

Before PARKER, *Chief Judge,* and SOPER and HAYNSWORTH, *Circuit Judges.*

PARKER, *Chief Judge:*

This is the second time that we have had before us these three condemnation cases involving compensation for the taking of lands on the Savannah River. Commissioners appointed by the court below to value the lands filed a report showing that, when considered in connection with their availability for water power purposes, they had a value of $267.02 per acre, or a total value of $471,904.45, but that, as agricultural or wild forest lands, they had a value of approximately $37 per acre, or a total value of $60,293 for the 1,610.8 acres owned by the defendant in fee simple. The District Judge, without passing upon the valuation for agricultural and forestry purposes, approved the valuation based upon their availability for water power purposes (114 F. Supp. 719), and this court affirmed. *United States* v. *Twin City Power Co.,* 4 Cir. 215 F. 2d 592. The Supreme Court granted certiorari and reversed, holding that the availability of the lands for water power purposes might not be considered in valuing them for the purpose of determining just compensation on condemnation by the government. 350 U. S. 222.

On remand, the District Judge, sitting with the District Judge for the Southern District of Georgia, who had jurisdiction with respect to the lands on the Georgia side of the river, reviewed the evidence and the findings of the commissioners as to the value of the lands for agricultural and forestry purposes. He held the findings with respect to these values to be clearly erroneous and found the correct value of the lands, without considering their availability for power development, to be around $80 per acre, or a total of $131,388, for which he entered judgment. He held

that no recovery could be had for flowage easements owned by defendant power company over 156.56 acres of land to which it did not hold fee simple title. The government has appealed from the judgment fixing the value of the lands, contending that the amount thereof is excessive and that the judge transcended his powers in overruling the findings of the commissioners. The power company has appealed from the holding that it was not entitled to any compensation for the taking of the flowage easements which it held.

We think that the District Judge was justified in holding the report of the commissioners as to the valuation of the land for agricultural and forestry purposes to be clearly erroneous and substituting a valuation at which he had arrived after a careful study of the testimony; and weight is added to his action by reason of the fact that the District Judge from Georgia, sitting with him and reviewing the same record, took similar action. The commissioners had made their valuation at a time when it was thought that the highest value of the land was that arising from its availability for water power purposes; and, as this value was far above its value for agricultural and forestry purposes, they gave little attention to the latter, contenting themselves with a brief statement with regard thereto at the end of a lengthy report dealing principally with value for water power purposes. In reporting on value for agricultural and forestry purposes, they adopted the valuation placed upon the land by a witness Cox, a furniture dealer, cattle raiser and saw mill operator, who was not shown to have had any special qualifications for valuing lands in that community, and ignored the testimony of two experienced land bank appraisers who were eminently qualified to appraise them. With

respect to the testimony of these appraisers, the trial judge said:

> Twin City offered two experienced land appraisers. One, W. N. Henderson of Ninety-Six, in Greenwood County, South Carolina, is a Clemson College graduate with 14 years of experience as a Federal Land Bank appraiser and 4 years with FHA. The other, Benjamin R. T. Todd, was educated at Clemson and at the Naval Academy. He had long years of experience as Senior Appraiser with the Federal Land Bank in Columbia. Each has appraised many tracts of land in the area of the Clark Hill reservoir. Both of these witnesses, as well as the witnesses for the United States, have testified before me in other condemnation cases.
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> Mr. Henderson, after detailed study of the several tracts being considered, determined that the principal agricultural uses of these lands were for pasturage to feed cattle, which at the time of taking was an important and growing use of lands in this area, and for the growing of pine. Some 300 acres of bottom land were also useful for row crops. All of the witnesses for both sides agreed that raising cattle and pine had become the chief use of lands in this area, though row crops were still planted in the bottoms.
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> Mr. Henderson concluded that, aside from the value of timber and pulp wood on these tracts, the 300 acres of bottom land was worth $100 per acre and the other 1300 acres had a value of $85 per acre. In reaching these conclusions, Mr. Henderson took into consideration the amount it would take to put land into pasturage condition, the yield from tree farming, the price of timber and pulp wood, the demand for such lands. He valued the timber on the properties at $17,000 and the strip of land used for a railroad (5.80 acres) at $1,500. His total valuation for Twin City's South Carolina properties was $159,425.

Mr. Todd's valuation at $100 per acre aggregated $161,080.

The trial judge pointed out that the chief land witness relied upon by the government had never previously sold or appraised land in this community and that, although he made his valuation on the basis of a comparison of sales, he used only seven sales as a basis of comparison, although he had a list of 400 transfers of rural lands in the county, that five of the seven occurred a year or more before the taking and that he admitted that to buy land in the county at the time of the taking one would have had to pay a much higher price than his appraisal. As to the witness Cox, whose valuation was adopted by the commissioners and another witness relied on by the government, the judge said:

> The Commissioners in their finding followed the appraisal of James M. Cox who testified for the Government. Mr. Cox is a furniture dealer, a cattle raiser and a sawmill operator. He had no experience in handling real estate for others and little for himself. Instead of testifying as to market value he appraised so as to allow for "making a sawmill man's profit on it." The testimony does not show how much below market value this is. He was unwilling to state the land's worth for pasture though he stated that one of its best uses was for raising cattle. His is not the type of testimony on which an award should be based when there is in the record so much more reliable evidence.
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> Another government witness, the Augusta broker Gould Barrett, had never inspected the Twin City lands, had not sold any lands in McCormick County in the five years before his testimony in this case, and was unfamiliar with timber prices. These witnesses for the United States placed a per acre value on the Twin City lands of between $15 and $25 per acre. The

> Commissioners, adopting the testimony of James M. Cox on land and Clark Honnold on timber, added a value of $5 per acre for assembling and arrived at a total value of about $60,000 as compared with the Henderson and Todd appraisals of about $160,000.
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> The findings of the Commissioners as to the agricultural value of these South Carolina lands based on the Cox appraisal are clearly erroneous as that term is defined hereinabove.

The government argues that because there was substantial testimony supporting the findings of the commissioners and because they saw and heard the witnesses, the trial judge was bound to accept their findings. If this were the law, the right of review vested in the trial judge by Rule 53 would amount to little, for almost always the master or commissioners see and hear the witnesses and seldom do they render a report which can be said to be without substantial support in the evidence. It was the purpose of the rule, where there is a trial without a jury, to place ultimate responsibility for the findings of fact upon the judge. Where there has been a reference to a master, the master's findings are entitled to special weight because he has seen and heard the witnesses but they are not given the effect of a verdict by a jury. The language of the rule is that the court shall accept the master's findings unless clearly erroneous. This is manifestly a guide to be followed in the exercise of the discretion vested in the District Judge, not a limitation upon his power. The rule applicable is well stated by Judge Bratton, speaking for the Court of Appeals of the Tenth Circuit in *United States* v. *Waymire,* 10 Cir. 202 F. 2d 550, 553, as follows:

> Under the plain language of Rule 53, it is the duty of the court to accept the findings of fact made by a master unless they are clearly erroneous. But the findings of a master may be

> modified in part, or rejected in toto, if they are clearly erroneous. In like manner, under the equally clear language of Rule 71A (h), the findings and awards of a commission shall be accepted unless they are clearly erroneous. But they may be modified in part, or rejected in toto, if they are clearly erroneous. And even though there is evidence to sustain findings of a master or a commission, as the case may be, they are clearly erroneous if the reviewing court on the entire evidence has the definite and firm conviction that a mistake has been committed.

We review the District Judge, not the commissioners; and under Rule 52 (a) we may not set aside his findings unless they are clearly erroneous. When he has set aside the findings of a master or commissioners, we must give consideration to the fact that they saw and heard the witnesses and that he did not, and we must pass upon his findings with this in mind; but, unless we can then say that his findings are clearly erroneous when viewed in this light, we must accept them. In the case before us, we cannot say that the findings of the judge were clearly erroneous. On the contrary, we think that he has demonstrated that they rest upon a reasonable basis and that his overruling of the report of the commissioners and adopting a valuation different from theirs should be sustained.*

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* For a condemnation case in which the action of the trial judge was sustained in overruling the findings of commissioners, see *United States* v. *44 Acres of Land*, 2 Cir. 234 F. 2d 410, 414. For a case in which the action of a trial judge was sustained in overruling the findings of a master, see *Krinsley* v. *United Artists Corporation*, 7 Cir. 235 F. 2d 253, 257-260. For cases in which appellate courts have set aside concurrent findings of the master and the trial judge, see *Beckley Bank* v. *Boone*, 4 Cir. 115 F. 2d 513, 515-516; *H. F. Wilcox Oil & Gas Co.* v.

There is no merit in the contention of the government that the judge improperly valued the property by adding the value of the timber to the value of the land. The record shows that the witness Henderson arrived at his valuations of the land as a whole by adding the value of the timber to the value of the land considered without the timber. The judge accepted the valuation of the witness Honnold as to what the timber was worth, which was approximately $4,000 less than the value placed on it by Henderson. He did not, however, add this valuation to Henderson's valuation of the land, but valued the entire property at $131,388, which was more than $9,000 less than the valuation placed by Henderson on the land without the timber. It was, of course, proper for the judge to take the value of the timber into consideration in valuing the property. See *Cade* v. *United States*, 4 Cir. 213 F. 2d 138.

We think that the judge was in error, however, in denying the company compensation with respect to the taking of the flowage easement over the 156.56 acres, as to which the company did not own the fee simple interest. It will not do to say that the flowage easement has no value except for power purposes and that the Supreme Court has ruled that this may not be considered on the question of due compensation. The answer is that the owners of the land are entitled to recover for the taking thereof by the government and that, where the owner of the fee has parted with the flowage easement to another, that other, and not the owner of the fee, is entitled to recover the part of the compensation attributable to the taking of the easement. We dealt with this pre-

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Diffie, 10 Cir. 186 F. 2d 683, 696; *Slattery Company* v. *United States*, 5 Cir. 231 F. 2d 37, 43; *Baltimore Dairy Lunch* v. *United States*, 8 Cir. 231 F. 2d 870.

cise question in our recent decision in *United States* v. *2979.72 Acres of Land in Halifax County, Virginia*, 4 Cir. 235 F. 2d 327, rehearing denied, 237 F. 2d 165, where we said (235 F. 2d at 329–330):

> It is argued that the government should not be required to pay anything to the power company, for the reason that the flowage rights that the power company has acquired are of value only for the purposes of water power development. The answer is that the conveyance of flowage rights by the owner of the land to the power company vested in the latter the interest in the land that is being taken by the government here in the condemnation proceeding and entitles it to compensation for the taking of such interest. See *United States* v. *Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. Ed. 787. The proposition that because the government has obtained from the owner of the fee a conveyance for which it has paid only one dollar (evidently accepted because the remaining interest in the land had no value after the conveyance of the easement to the power company), it may acquire by condemnation the right to flood the land without paying anything to the owner of the flowage easement, has nothing to commend it either in logic or in common sense. If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for the condemnation of flowage rights by the government. Where these flowage rights have been conveyed to another, there is no reason in law, in equity, in good conscience or in common honesty why the compensation to which she would otherwise have been entitled should not be paid to the one to whom such rights have been conveyed.

In denying the petition for rehearing, we said:

> A petition for rehearing insists that since the flowage easement of the power company

had no value to it except for water power purposes, and since value for such purposes cannot be considered, it is not entitled to any compensation whatever for the destruction of its easement as a result of the government's taking. The answer is that the taking by the government is a proceeding in rem. It must pay as compensation for the taking the amount by which the value of the land is decreased as a result of the taking of the flowage easement; and the owner whose interest is damaged as a result of the taking of that easement is entitled to the compensation. There can be no question but that the power company here had acquired the interest in the land, i. e., the flowage rights, which the government is taking by condemnation, and that compensation for such taking should be made to the power company as the owner of that interest. And there can be no question, furthermore, but that the compensation to be paid is, not the value of that interest to the power company, but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes. The case is not one of paying compensation to the owner of the land for the imposition of an additional or second easement, but of allocating compensation between the owner of the fee and the owner of a flowage easement which is destroyed as a result of the taking.

No one would contend that the government would not be liable to the owner of fast land which it floods for the difference in the value of the land with and without the flooding, excluding, of course, its value for power development. When a flowage easement has been granted to another, it seems equally clear that the owner of such easement is entitled to the part of the compensation attributable to the destruction of the easement. The compensation to be paid must be meas-

ured, of course, by the value of the land for agricultural and forestry purposes without reference to its value for power purposes; and when this value has been ascertained it must be apportioned between the owner of the fee and the defendant power company, the owner of the easement. If it should appear that the value of the land for agricultural and forestry purposes has been practically destroyed by the grant of the easement, then the power company would be entitled to substantially all of the compensation. If, however, it should appear that the land has value for agricultural and forestry purposes, notwithstanding the grant of the easement, the owner of the fee would be entitled to this, the power company being entitled to the difference between this and what the value would be for agricultural and forestry purposes without the easement. The position that the owner of the fee cannot recover for the flooding because he has parted with the flowage easement and that the owner of the easement cannot recover because he does not own the fee, has nothing to commend it either in law or in reason.

The judgments appealed from will accordingly be affirmed in so far as they award compensation for the lands as to which the fee simple interest of the power company was taken and will be reversed in so far as they deny compensation with respect to the 156.56 acres over which the power company had a flowage easement and the cases will be remanded for further proceedings not inconsistent herewith.

Affirmed in part, reversed in part and remanded.

OPINION ON REHEARING

Per Curiam:

A petition for rehearing calls attention to the fact that the government has paid compensation to the

owners of the fee in lands over which the power company owns a flowage easement. This, however, does not constitute compensation to the power company for the destruction of the easement conveyed to it prior to the taking by the government. While the value of such an easement for water power purposes may not be considered in awarding compensation, there is no reason why the holder thereof should not receive compensation for the interest in the land which it represents. The right to such compensation manifestly cannot be destroyed by acquiring a conveyance from the owner of the fee, who prior thereto had conveyed to the power company the right to flood the land. As we pointed out in our opinion herein:

> No one would contend that the government would not be liable to the owner of fast land which it floods for the difference in the value of the land with and without the flooding, excluding, of course, its value for power development. When a flowage easement has been granted to another, it seems equally clear that the owner of such easement is entitled to the part of the compensation attributable to the destruction of the easement. The compensation to be paid must be measured, of course, by the value of the land for agricultural and forestry purposes without reference to its value for power purposes; and when this value has been ascertained it must be apportioned between the owner of the fee and the defendant power company, the owner of the easement. If it should appear that the value of the land for agricultural and forestry purposes has been practically destroyed by the grant of the easement, then the power company would be entitled to substantially all of the compensation. If, however, it should appear that the land has value for agricultural and forestry purposes, notwithstanding the grant of the easement, the

owner of the fee would be entitled to this, the power company being entitled to the difference between this and what the value would be for agricultural and forestry purposes without the easement.

It is said that the power company has sustained no loss because the only value to it of the right to flood the land was for the development of water power, which may not be considered as an element of value for purposes of compensation. It is elementary, however, that compensation is determined on the basis of market value, not on the basis of the use which the owner is making or may make of it. 18 Am. Jur. p. 877; *Olson* v. *United States,* 292 U. S. 246, 255. Where land is taken the owner or owners must be awarded this value, and where an easement has been conveyed to another by the owner of the fee, the owner of the easement is entitled to share in the award to the extent of the value of the easement, excluding, of course, its value for water power purposes. Settlement with the owner of the fee in such case for his interest in the land cannot foreclose the right of the owner of the easement to compensation. Unquestionably the conveyance of a flowage easement conveys a valuable interest in the land and one which depreciates the value of the interest remaining in the owner of the fee, even though its value for power development may not be considered; and, if the government may acquire the right to flood the land by taking a conveyance of the interest remaining in the fee simple owner after the conveyance of the easement, no amount of sophistry can obscure the fact that it is acquiring for nothing the interest represented by the easement. The Supreme Court has held that compensation need not be made for the element of value represented by availability for water power development. It has not

held that other elements of value may be ignored or that the government may take for nothing an interest in land merely because the land lies along a navigable stream.

The petition for rehearing alleges that a part of the 156.56 acres covered by the company's flowage easement is not being taken by the government in these proceedings; but this is a matter to be considered by the District Court, which will, of course, award compensation only for property taken in the proceedings before it with such damages as are shown to have resulted from the taking. See 18 Am. Jr. p. 905; *United States* v. *Cress*, 243 U. S. 316, 327; *Campbell* v. *United States*, 266 U. S. 368, 371.

Other questions raised by the petition for rehearing have been fully considered but are so lacking in merit as not to warrant further discussion.

Rehearing denied.

JUDGMENT

Filed and Entered July 15, 1957.

In the United States Court of Appeals for the Fourth Circuit

No. 7427

UNITED STATES OF AMERICA, APPELLANT AND CROSS-APPELLEE

v.

TWIN CITY POWER COMPANY, APPELLEE AND CROSS-APPELLANT

(Tract No. C-215)

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

This cause came on to be heard on the record from the United States District Court for the Western District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in so far as it awards compensation for the lands as to which the fee simple interest of the power company was taken and reversed in so far as it denies compensation with respect to the 156.56 acres over which the power company had a flowage easement; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of South Carolina, at Greenwood, for further proceedings not inconsistent with the opinion of the Court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.